United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-2050

B
P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, ex rel.
GEORGE FOYE,

Petitioner-Appellant,

-against-

J. E. LaVALLE, Superintendent of
Clinton Correctional Facility, Dannemora,
N.Y.,

Respondent-Appellee.

DOCKET NO.
75-2050

BRIEF FOR PETITIONER-
APPELLANT

ON APPEAL FROM A MEMORANDUM-DECISION
AND ORDER
OF THE UNITED STATES DISTRICT
COURT FOR THE NORTHERN DISTRICT
OF NEW YORK

MICHAEL DAVIDOFF, ESQ.
Attorney for Petitioner-
Appellant
270 Broadway, Box 329
Monticello, New York 12701
Telephone: (914) 794-8220

TABLE OF CONTENTS

TABLE OF CASES

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, ex rel.
GEORGE FOYE,

Petitioner-Appellant,

-against-

J. E. LaVALLE, Superintendent of
Clinton Correctional Facility, Dannemora,
N.Y.,

Respondent-Appellee.

DOCKET NO.
75-2050

BRIEF FOR PETITIONER - APPELLANT

ISSUES PRESENTED

Was the refusal of the Trial Judge to allow the Appellant's Counsel the right to examine the notes and the written report of the State Police Investigator after he testified when it was produced in Court and available, a deprivation of Appellant's rights as provided in the 6th Amendment of the Constitution as to confrontation and cross-examination of witnesses, and therefore a violation of his Constitutional Rights as to due process of law as guaranteed by the 14th Amendment of the Constitution of the U.S.?

Further, did the notes and written report of Investigator Brown of the New York State Bureau of Criminal Investigation, contain exculpatory material that would have been favorable to defense counsel in the cross-examination of Brown, and strategy of defense during the trial, and thus constitute violations of Constitutional proportions, contrary to the principles of Brady v. Maryland, 373 U.S. 83 (1963) in that the prosecution failed to disclose evidence favorable and vital to the defense?

STATEMENT PURSUANT TO RULE 28(3)

Preliminary Statement

This is an appeal from a Memorandum-Decision and Order of the United States District Court for the Northern District of New York (The Honorable James T. Foley) dated February 4, 1975, which reaffirmed The Honorable James T. Foley's previous decision of January 4, 1974, which decision denied and dismissed petitioner's application for a Writ of Habeas Corpus. The decision of February 4, 1975 by Judge Foley granted petitioner a Certificate of Probable Cause and previously, on February 11, 1974, the petitioner was granted leave to proceed in forma pauperis.

STATEMENT OF FACTS

A. Prior Proceedings

After a Jury Trial in the County Court of Sullivan County, State of New York, the Appellant was convicted of the Class A Felony of Murder, and on the 13th day of July, 1973, judgment and sentence was pronounced by the County Court of the County of Sullivan, sentencing him to an indeterminate term of imprisonment, the minimum of which shall be fifteen years and the maximum shall be the term of the Petitioner's natural life. Appellant's conviction was affirmed, without opinion, in the Supreme Court of the State of New York by the Appellate Division, Third Department , (41 AD 2d 902 (1973)), and leave to appeal to the Court of Appeals was denied by the Honorable Charles D. Breitel, Associate Judge, on the 12th day of June, 1973.

Petitioner made application by nature of a Petition for a Writ of Habeas Corpus to the United States District Court for the Northern District of New York, by Petition verified the 20th day of November, 1973. (AP 1-79)

On January 4, 1974, the Honorable James T. Foley, United States District Court Judge, by Memorandum-Decision and Order, denied and dismissed the petitioner's Writ for Habeas Corpus.(AP 80-84)

On January 22, 1974, the Honorable James T. Foley, granted petitioner's application for a Certificate of Probable Cause ,

and on February 11, 1974, Judge Foley granted petitioner permission to proceed in forma pauperis in petitioner's appeal to the United States Circuit Court of Appeals for the Second Circuit. (AP 85)

By decision of the United States Circuit Court of Appeals for the Second Circuit, dated June 10, 1974, (499 F. 2d 1242), the Honorable Harold R. Tyler, Jr., writing for the three-judge panel, set aside so much of the order of the District Court dated January 4, 1974, which pertained to the investigative report issue, and remanded the case for further proceedings consistent with their Memorandum-Decision. (AP 86-88)

The Honorable James T. Foley issued a Memorandum-Decision and Order dated August 14, 1974, setting a hearing for September 4th, 1974, in Albany, New York, and issued a Writ of Habeas Corpus to produce the petitioner at said hearing. (AP 89-90)

At the hearing, there was introduced into evidence and marked as Court Exhibit "1", a State Police report, which said report was purported to be by the District Attorney of Sullivan County, (who was present at the said hearing along with an Assistant Attorney General of the State of New York) the New York State Police Investigative Report. (AP 93-124)

The District Court permitted MICHAEL DAVIDOFF, ESQ., the attorney for the petitioner, who was present along with the petitioner, in person, the opportunity to examine Court Exhibit "1", after EMANUEL

GELLMAN, the District Attorney for Sullivan County, appearing along with TIMOTHY O'BRIEN, Assistant Attorney General, on behalf of the Respondent, refused to allow petitioner's attorney to be supplied with a copy of the exhibit.

Upon reading the Court Exhibit "1", the attorney for the petitioner became aware that the said exhibit was not complete and did not represent the complete investigative file of the New York State Police and also the notes of Investigator Brown concerning this matter. This was brought to the attention of EMANUEL GELLMAN, District Attorney of Sullivan County, who, upon examining the report, agreed that there was a portion of the Investigative report which was not included.

The Honorable Judge Foley then ordered that MICHAEL DAVIDOFF, ESQ., as attorney for the petitioner, be provided with a copy of the report which was before the Court and marked Court Exhibit "1" and that he also be given a copy of the further investigative report which was not yet before the Court, upon the District Attorney of Sullivan County obtaining said report.

Judge Foley further stayed his own order for a period of five (5) days, giving the respondent an opportunity to apply to the Circuit Court of Appeals for a stay.

There was also submitted to the District Court and marked as Court Exhibit "2", a copy of the excerpts of the investigative report

which had been the only portion of that report submitted to the attorney for the defendant during the actual trial of the matter in the County Court, Sullivan County, State of New York. (AP 125)

The attorney for the petitioner was given a copy of that portion of the investigative report which had been submitted to the Court and which had been marked Court Exhibit "1".

The attorney for the petitioner was advised that he was to submit a brief to Judge Foley fourteen (14) days after receipt of the additional report by the District Attorney of Sullivan County.

No stay was obtained by the respondent and MICHAEL DAVIDOFF, ESQ., as attorney for petitioner, was given a copy of an additional investigative State Police Report by the District Attorney of Sullivan County on the 16th day of September, 1974, a copy of which was submitted to the United States District Court. (Court Exhibit "1" which is annexed to the appendix at page 93-124 represents the first part of the investigative State Police Report which was submitted to the Court at the hearing in Albany. The second portion of the investigative report which was submitted to the petitioner's attorney at a later date, is annexed to the appendix at page 132-141. Judge Foley, in his Memorandum-Decision and Order of February 4, 1975, filed these reports as appendix A and appendix B to his decision. Since appendix A was the same report as that submitted to Judge Foley at the hearing, which was

marked Exhibit "1," in preparing the appendix on appeal, this portion of the investigative police report was not duplicated for a second time. Therefore, the entire police investigative report which was submitted to Judge Foley and to petitioner's attorney consists of that which is marked Court Exhibit "1" in the appendix at page 93-124 and that portion which is annexed to the decision of Judge Foley of February 4, 1975 in the appendix at page 132-141).

After the petitioner's attorney submitted a brief and answering affidavits were submitted by the District Attorney of Sullivan County and the Assistant Attorney General of the State of New York, the matter was fully submitted to Judge Foley who rendered his Memorandum-Decision and Order on the 4th day of February, 1975, which reaffirmed the denial of the petition by decision dated January 4, 1974, and which granted a Certificate of Probable Cause. (AP 126-132).

B. Facts

The Appellant, and one DELOIS HARDEN, were jointly indicted for Murder by indictment of the Sullivan County Grand Jury, dated the 21st day of February, 1972. A severance was granted by the Sullivan County Court. The Appellant's case commenced by the selection of a Jury on the 16th day of May, 1972. During the Appellant's trial before the Sullivan County Jury, the People of the State of New York in their direct case , called as a witness, INVESTIGATOR BROWN, a member of the New York State Police, and the officer in charge of the investigation concerning the circumstances surrounding the death of the infant , for whom the Appellant was charged with the crime of Murder. On direct examination, the officer testified as to his conversations with the Appellant, and with DELOIS HARDEN. (DELOIS HARDEN became the prosecutions principal witness against the Appellant after she pled guilty to a reduced charge of Assault in the 1st Degree, prior to the trial of the Appellant.) INVESTIGATOR BROWN also testified as to his conversations with the other parties. On cross-examination, INVESTIGATOR BROWN , admitted that he had made notes and from his notes had prepared a written report, which report contained the results of his investigation and that he had filed this written report with his superiors, and ONE MONTH PRIOR TO HIS TESTIFYING AT THE TRIAL, HAD REFRESHED HIS RECOLLECTION FROM THIS WRITTEN REPORT. (AP 4, 32, & 33)

The Appellant's attorney made the appropriate motions to the Trial Court Judge for the production of that report, and for it to be made available in its entirety for examination by Appellant's Counsel. The Trial Court Judge not only refused Appellant's Counsel the right to inspect the notes and written report of INVESTIGATOR BROWN, but allowed the notes and written report to be brought into the Court and to be reviewed, NOT BY THE TRIAL COURT JUDGE, NOT BY THE APPELLANT'S COUNSEL, BUT BY THE ASSISTANT DISTRICT ATTORNEY, prosecuting the case on behalf of the State of New York, who was then instructed to turn over to the Appellant's Counsel, only those portions of the notes and written report which he, the Assistant District Attorney, believed were material. Out of the entire report, Appellant's Counsel was entitled to see only a couple of sentence excerpts. (AP 6, 51, 52 &53) A copy of the excerpts which were submitted to the attorney at the trial of the action was submitted to Judge Foley at his request, at the hearing, and was marked Court Exhibit "2" and is contai ned in the appendix at page 125.

ARGUMENT

A. Summary

The refusal of the Trial Court Judge to allow Appellant's Counsel the right to inspect and to use for the purposes of cross-examination of INVESTIGATOR BROWN, the notes and written report of his investigation (after he had been called as a witness on behalf of the PEOPLE and had given testimony on their behalf and had admitted that he had prepared a written report and had submitted a written report to his superiors and had referred to that written report within one month of testifying and had refreshed his recollection at the trial and after the written report had been produced at the time of trial) was a violation of Appellant's Constitutional Rights as guaranteed by the 6th Amendment as to the confrontation and cross-examination of witnesses and, therefore, a denial of due process of law as guaranteed by the 14th Amendment of the Constitution of the United States.

The United States Circuit Court of Appeals for the Second Circuit set aside so much of the order of the United States District Court dated the 4th day of January, 1974 which pertained to the investigative report issue and remanded the case for further proceedings, consistent with their Memorandum Opinion.

The Memorandum Opinion set forth that since the investigative report had not been examined by the District Court, it could not be

determined whether the prosecution had failed to disclose evidence vital to the defense. Brady v. Maryland 373 U.S. 83 (1963).

The United States District Court , by the Honorable James T. Foley, District Court Judge, reviewed the investigative report submitted by the respondent and by Memorandum-Decision and Order dated the 4th day of February, 1975, stated that there was nothing evident to the District Court Judge from the reading of the investigative report that would lead to the drastic conclusion to set aside the state conviction.

It is the contention of the petitioner that the investigative reports which should have been disclosed to the petitioner's counsel after the direct examination of Investigator Brown, contains exculpatory material that would have been favorable to defense counsel in the cross-examination of Brown and the other material witnesses and to the strategy of the defense during the trial and thus constitutes a violation of Constitutional proportions contrary to the principles of Brady v. Maryland, Supra, in that the prosecution failed to disclose evidence favorable and vital to the defense.

B. Argument-Federal Rule

The Federal Rule is well established in (that statements or reports of a government witness who has testified on direct examination may be produced for inspection by the defense in a federal criminal case where such papers fall within the statutory definition of producible "statement" and relate to the subject matter as to which the witness has testified.) (7 ALR 3d, 273.)

The United States Supreme Court in Jencks v United States 353 US 657, 1 L. Ed 2d 1103, 77 S Ct. 1007, stated at page 688 as follows:

> "This Court held in Goldman v. United States, 316 U.S. 129, 132, that the trial judge had discretion to deny inspection when the witness"...does not use his notes or memoranda (relating to his testimony) in court..." We now hold that the petitioner was entitled to an order directing the Government to produce for inspection all reports of Matusow and Ford in its possession, written and, when orally made, as recorded by the F.B.I., touching the events and activities as to which they testified at the trial. We hold, further, that the petitioner is entitled to inspect the reports to decide whether to use them in his defense. Because only the defense is adequately equipped to determine the effective use for purpose of discrediting the Government's witness and thereby furthering the accused's defense, the defense must initially be entitled to see them to determine what use may be made of them. Justice required no less."

In response to the Jenck's Case, Congress passed the Jencks Act (18 USC S 3500), which controls the production of a government witnesses statement and report.

If the facts of this case had occurred in Federal prosecution, there would have been reversible error for the Trial Court Judge to have refused Appellant's Counsel's request.

In the United States v. McCarthy, 301 F. 2d 796 (3d Cir., 1962), the Court of Appeals held that the report which was prepared by an F. B. I. agent from notes taken by two agents in interview of defendant five days after bank robbery and which was checked for accuracy by other agent, who was witness, was written statement signed or otherwise adopted or approved by witness within Jencks Act and failure to permit defense counsel to view report, which had been routinely destroyed before trial, was prejudicial where it affirmatively appeared that report could have been advantageously used by defense.

The Court went further in that case and discussed whether or not the failure of the lower court to permit defense counsel to review the report was harmless error. On page 801, the Court stated as follows:

> "We do not pretend to have exhausted the useful potentialities of the report to the defense and as the Supreme Court said in Clancy et al. v. United States, 356 U.S. 312, 81 S. Ct. 645, 5 L. Ed. 2d 574(1961)"***it is not for us to specu-

late whether they could have been utilized effectively." In that opinion as already quoted the Court reiterated its dispositive statement in Jencks v. United States, 353, U.S. 657, 667, 77 S. Ct. 1007, 1013 , 1 L. Ed. 2d 1103(1961), relative to the type of report before us saying:

> "Flat contradiction between the witness' testimony and the version of the events given in his report is not the only test of inconsistency. The omission from the reports of facts related at the trial, or a contrast in emphasis upon the same facts, even a different order of treatment, are also relevant to the cross-examining process of testing the credibility of a witness' trial testimony."

In the case of United States v. Meisch 370 F. 2d 768 (3 d Cir. 1966) the United States Court of Appeals held that where it appeared that the report by a special agent who allegedly had observed sale of notes by defendant could have been advantageously used by defense to impeach special agent concerning his testimony, refusal of court to direct prosecution to deliver report to defendant for his use at trial was prejudicial error. The court went further in this case in discussing when such report should be permitted to be used by the defendant and stated at page 772 as follows:

> "Whether the statements may be useful for purposes of impeachment is a decision which rests, of course,

with the defendant himself."
Scales v. United States, 367
U.S. 203, 258, 81 S. Ct. 1469,
1501, 6 L. Ed. 2d 782 1961).
In Campbell v. United States,
373 , U.S. 487, 497, footnote 13,
83 S. Ct. 1356, 10 L. Ed. 2d
501, the Supreme Court pointed
that under Jencks v. United
States, 353 U.S. 657, 677-678,
77 S. Ct. 1007, 1501, 1 L. Ed.
2d 1103, a showing of inconsistency
as a prerequisite to the production
of documents is unnecessary. See
also Lewis v. United States, 340 F.
2d 678 (C.A. 8); United States v.
Prince, 264 F. 2d 850, 852 (C.A. 3).
Nevertheless, as has been indicated
earlier, it affirmatively appears
that the report could have been ad-
vantageously used by the defense to
impeach Szpak concerning his testi-
mony of events about the informant,
Barker, who accompanied Vecchione
to the parking area of the Cork and
Bottle Bar in Edison Township. The
refusal of the trial judge to direct
the prosecution to deliver the May 26,
1964 report, with such portions which
did not relate to the subject matter of
Szpak's testimony deleted, to the ap-
pellant for his use at the trial, was
not harmless error. See United States v.
McCarthy, 301 F. 2d 796 (C.A. 3, 1962)."

C. New York Law

The law of the State of New York in regard to the cross-examination of a police or investigating officer testifying for the prosecution is contained in the New York Court of Appeals Decision of People v. Rosario, 9 N.Y. 2d 286, 173 N.E. 2d 881, 213 N.Y.S. 2d 448, citing as its authority Jencks v. The United States 353 U.S. 657, stated at page 289 as follows:

> "That a right sense of justice entitles the defense to examine a witness' prior statement, whether or not it varies from his testimony on the stand. As long as the statement relates to the subject matter of the witness' testimony and contains nothing that must be kept confidential, defense counsel should be allowed to determine for themselves the use to be made of it on cross-examination."

The Court of Appeals of the State of New York in People v. Malinsky 15 N.Y. 2d 86, reaffirmed its position as stated in People v. Rosario, supra, by saying at page 90:

> "As to the later contention, the Court is of the opinion that Detective Sullivan's notes should have been turned over to the defendants for their inspection and possible use. We made it unmistakably clear in People v. Rosario (9 NY2d 286) that defense counsel must be permitted to examine a witness' prior statement, whether or not it differs from his testimony on the stand, and to decide for themselves the use to be

made of it on cross-examination, provided only that the statement "relates to the subject matter of the witness' testimony and contains nothing that must be kept confidential" (p. 289). And, obviously, it matters not whether the witness is testifying upon a trial or at a hearing. In either event, "a right sense of justice " entitles the defense to ascertain what the witness said about the subject under consideration on an earlier occasion."

In the case before this Court, there never was any claim by the prosecution that anything contained in the State Police Report of INVESTIGATOR BROWN must be kept confidential.

Though the report was brought into Court, it was not looked at by the Trial Court Judge and the Assistant District Attorney who was prosecuting the case was instructed to look through the report and to excerpt only that portion of the report which, he, the prosecuting attorney, believed was material to the testimony of the investigating officer. (AP52 & 53)

D. Non-Disclosure by the Prosecution of Evidence Vital to the Defense Deprived the Petitioner of a Fair Trial and Raises a Constitutional Issue Cognizable in a Federal Habeas Corpus Proceeding

It is now well settled law that the prosecution is under a duty to disclose to the defense , upon request, evidence which is material. The United States Supreme Court in Brady v. Maryland, 373, U.S. 83, at page 87, 83 S.Ct. 1194, 1196-1197, 10 L. Ed. 2d 215 (1963) , stated as follows:

> "We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faither of the prosecution. This requires a reversal of the order of the district court."

In United States of America ex rel. Butler v. Maroney, 319 F 2d . 622 (3d Cir. 1963) the Circuit Court of Appeals stated that the Habeas Corpus applicant was denied due process in State Court Trial of murder charge, by refusal to permit him to examine his statement to police. The Court there stated at page 627 as follows:

> "This withholding by the Commonwealth of information impinging on a vital area in appellant's defense is a denial of the Due Process Clause of the 14th Amendment of the Constitution."

The United States Court of Appeals for the Second Circuit in the Memorandum-Decision in remanding the instant case cited

the case of Scalf v. Bennett, 408 F. 2d 325, 330 (8 Cir. 1969), where that Court stated as follows:

> "The suppression of evidence by the prosecution could clearly be a denial of due process in the conviction of petitioner, (Brady v. Maryland, 373, U.S. 83 (1963)) and Habeas Corpus will lie to remedy a prejudicial non-disclosure. (Levin v. Katzenbach 124 U.S. App. D. C. 158, 363, F. 2d 287, 291, 1966 and other cases)

It is submitted that the investigative report of the New York State Police contains sufficient material which was vital to the defense and as a result of non-disclosure, after disclosure was required, there has, therefore, been prejudice to such an extent so as to have deprived the petitioner of a fair trial and federal Habeas Corpus relief should lie. (Giglio v. United States, 405, U.S. 150, 92 S.Ct. 763, 31 L. Ed. 2d 104).

E. Argument- Material Contained in the Investigative State Police Reports which should have been provided to the attorney for the petitioner

The main contention of GEORGE FOYE and the defense which was maintained throughout the trial of the said action before the jury, was that the acts which gave rise to the death of the infant were not those acts which had been committed by GEORGE FOYE, but were the acts of the co-defendant, DELOIS HARDEN, who had pled guilty immediately prior to the commencemencement of GEORGE FOYE'S trial to the reduced charge of assault in the lst degree. Any information which was contained in the State Police Investigative Reports and in the notes of Investigator Brown which would support the contentions of GEORGE FOYE would therefore be exculpatory. Any information contained in the Investigative Report and notes which would show that it was not GEORGE FOYE but the co-defendant, DELOIS HARDEN, who committed acts resulting in the death of the infant, would be crucial to the defense of GEORGE FOYE and should have been turned over to the attorney for the defendant immediately upon request, after the testimony of the investigating officer, INVESTIGATOR BROWN.

Those portions of the Investigative Report and notes of Investigator Brown which counsel believes are crucial and which would have tended to support

the defense of petitioner and were therefore exculpatory, are as follows:

From State Police Report (1st portion) (AP 93-124)

1. The statement by EVA ROBERTS referred to in Page 3, Item 9 of that report in which she advises that on one occasion she had come to the Harden/Foye residence and had been refused admittance to the apartment. (The report does not indicate who denied her admittance but if it was DELOIS HARDEN, this would indicate that DELOIS HARDEN had something to hide.) (AP 99)

2. The statement of CLARENCE WILLIAMS on Page 5, Item 15 in which he stated several instances of abuse of the infant by DELOIS HARDEN; one specifically concerning an incident involving a cookie jar. (At the trial of the action, WILLIAMS testified and on cross-examination on page 465 of the transcript, WILLIAMS was asked to relate all the instances in which he observed DELOIS HARDEN do anything to the infant. WILLIAMS neglected to testify in regard to the incident concerning a cookie jar and clearly this is an instance where if the defense had had the said report, it could have used it to further illicit information which would have tended to prove the innocence of GEORGE FOYE, the Petitioner.) (AP 101)

3. The interview of PAT MANNION, Page 6, Item 16, and the statement of PAT MANNION which is annexed to the report indicates that there were several instances which were observed by PAT MANNION of mis-use of the infant by DELOIS HARDEN, even though PAT MANNION testified at the time of the trial that she never related these instances, and once again that could have been of assistance to the Petitioner in his defense. (AP 102)

State Police Report (2nd portion) (AP132-141)

In regard to the 2nd portion of the investigative report which was provided to me by the DISTRICT ATTORNEY, EMANUEL GELLMAN on September 16th, 1974, the following are portions of this said report which would be exculpatory on behalf of the Petitioner.

4. On Page 3 thereof concerning the interview of the co-defendant, DELOIS HARDEN, she admitted to the State Police Officer that she had disciplined the boy with a belt over a period of time. That interview also contained further information which implicates the co-defendant, DELOIS HARDEN. (AP 135)

5. Page 4, Item 7, in the interview of LORRAINE HARDEN, she advised the officer of an instance in which she observed her daughter the co-defendant, DELOIS HARDEN, administer beatings to the infant. This information clearly goes to the actions of the co-defendant, DELOIS HARDEN's causing the death and would have been extremely helpful if known by the Petitioner who then could have assessed the situation as to whether to have that party testify as to these said actions. At the said trial, LORRAINE HARDEN was not a witness called by the PEOPLE and did not testify. Clearly, this is an example of exculpatory evidence which should have been given to the Petitioner. (AP 136)

CONCLUSION

The Memorandum-Decision and Order of the Honorable James T. Foley, dated the 4th day of February, 1975, should be reversed in that the investigative reports of the New York State Police which were not properly disclosed to the defense counsel contain exculpatory material that would have been favorable to the defense counsel in the cross examination of Brown and the other material witnesses and for the strategy of the defense during the trial, and thus constituted violations of Constitutional proportions, contrary to the principles of Brady v. Maryland, 373 U.S. 83 (1963), Scalf v. Bennett, 408 F. 2d 325 (1969), and, the previous Memorandum-Decision of the United States Circuit Court of Appeals for the Second Circuit concerning the above matter which is reported at 499 F. 2d 1242.

The petitioner requests that the United States Circuit Court of Appeals for the Second Circuit apply the cases and principles contained in its Memorandum-Decision concerning the instant case, which decision is cited above and, after reviewing the investigative reports, determine that the said reports did contain material which should have been disclosed to the defense and, therefore, grant the

relief requested in the Petitioner's Writ of Habeas Corpus.

Respectfully submitted,

MICHAEL DAVIDOFF, ESQ.
Attorney for the Petitioner-
Appellant
Office & P.O. Address
270 Broadway, Box 329
Monticello, New York 12701
Telephone: (914) 794-8220

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----------X

UNITED STATES OF AMERICA, ex rel.
GEORGE FOYE,

Petitioner-Appellant,

-against-

J. E. LaVALLE, Superintendent of
Clinton Correctional Facility, Dannemora,
N.Y.,

Respondent-Appellee.

----------X

AFFIDAVIT OF
MAILING
Docket No. 75-2050

STATE OF NEW YORK)
COUNTY OF SULLIVAN) SS.:

PETRINA TERRY, being duly sworn, deposes and says: that deponent is not a party to the action, is over 18 years of age and resides at Bloomingburg, New York.

That on the 24th day of April, 1975, deponent served the Appendix and the Brief (2) copies upon JOSEPH R. CASTELLANI, ESQ., the attorney for the Respondent-Appellee, in this action at the Attorney General's Office, Department of Law , Capitol, Albany, New York 12224, the address designated by said attorney for that purpose by depositing same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Post Office Department within the State of New York.

Petrina Terry
PETRINA TERRY

Sworn to before me, this 25th
day of April, 1975.

Michael Davidoff
NOTARY PUBLIC

MICHAEL DAVIDOFF
Notary Public, State of New York
Sullivan County Clerk's No. 1094
My Commission Expires March 30, 1977

STATE OF NEW YORK, COUNTY OF ss:

I, the undersigned, am an attorney admitted to practice in the courts of New York State, and

Check Applicable Box

☐ Attorney's Certification — certify that the annexed has been compared by me with the original and found to be a true and complete copy thereof.

☐ Attorney's Verification by Affirmation — say that: I am the attorney of record, or of counsel with the attorney(s) of record, for . I have read the annexed know the contents thereof and the same are true to my knowledge, except those matters therein which are stated to be alleged on information and belief, and as to those matters I believe them to be true. My belief, as to those matters therein not stated upon knowledge, is based upon the following:

The reason I make this affirmation instead of is

I affirm that the foregoing statements are true under penalties of perjury.
Dated:

.....
(Print signer's name below signature)

STATE OF NEW YORK, COUNTY OF ss:

being sworn says: I am

Check Applicable Box

☐ Individual Verification — in the action herein: I have read the annexed know the contents thereof and the same are true to my knowledge, except those matters therein which are stated to be alleged on information and belief, and as to those matters I believe them to be true.

☐ Corporate Verification — the of a corporation, one of the parties to the action: I have read the annexed know the contents thereof and the same are true to my knowledge, except those matters therein which are stated to be alleged on information and belief, and as to those matters I believe them to be true.

My belief, as to those matters therein not stated upon knowledge, is based upon the following:

Sworn to before me on , 19

.....

.....
(Print signer's name below signature)

STATE OF NEW YORK, COUNTY OF ss:

being sworn says: I am not a party to the action, am over 18 years of age and reside at

On , 19 , I served a true copy of the annexed in the following manner:

Check Applicable Box

☐ Service By Mail — by mailing the same in a sealed envelope, with postage prepaid thereon, in a post-office or official depository of the U.S. Postal Service within the State of New York, addressed to the last known address of the addressee(s) as indicated below:

☐ Personal Service — by delivering the same personally to the persons and at the addresses indicated below:

Sworn to before me on , 19

.....

.....
(Print signer's name below signature)